OGC 78-3788
9 June 1978

Media

MEMORANDUM FOR: Director of Central Intelligence

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Congressman Les Aspin's Comment in 29 May 1978 Issue of Time Magazine

1. Action Requested. Your consideration of the attached proposed letter (TAB A) to Les Aspin.

2. Background. The 29 May 1978 issue of Time Magazine contained the following:

> Les Aspin, Congressman from Wisconsin: 'The CIA can't be the only arbiter of what is or isn't classified. There ought to be somebody you can appeal to--an arbitrator set up by an act of Congress.'

You asked that we look over your testimony to Senator Biden's Subcommittee on Secrecy and Disclosure and prepare a polite letter to Congressman Aspin on his statement.

3. The context in which Mr. Aspin made the statement is unclear. The Agency, of course, is not "the only arbiter of what is or isn't classified." The Interagency Classification Review Committee (ICRC) established by Executive Order 11652 is authorized to consider appeals of denials of declassification requests under the Order and the NSC Directive on classification, downgrading, and declassification. This admittedly is entirely an Executive Branch process. Under the Freedom of Information Act Amendment of 1974, however, federal district courts are empowered to determine whether the Agency may withhold records from a requester, on the basis of, for example, information "in fact properly classified pursuant to... Executive Order." The court is authorized to review Agency documents in camera and to determine the matter "de novo."

4. When the 1974 amendment was passed President Ford expressed some reservations about the constitutionality of

providing for judicial review of an Executive classification decision. Since the 1974 amendment, however, the district courts have not been eager to review documents in camera and become involved in "de novo" classification reviews. Instead, they have generally held, as indicated by the legislative history to the 1974 FOIA amendment, that Congress intended that substantial weight should be given to the appropriate Executive Branch officials' judgment regarding classification.

5. Mr. Aspin's concern might also arise with respect to classified information the Executive Branch provides to Congress and its release to the public. On this score, however, a procedure is established in both S. Res. 400 and H. Res. 658 pursuant to which the full Senate or House can vote to release classified information. Such action would certainly declassify the information as a practical matter.

6. There is yet another context in which Congressman Aspin may have spoken. Under the secrecy agreements which all Agency employees sign, the Agency is authorized to review material proposed for publication (relating to intelligence or intelligence sources and methods) to determine whether the material contains classified information as defined in E. O. 11652. The secrecy agreement currently states:

> I agree that the Central Intelligence Agency has the authority to make the final determination as to whether information is classified and thus should be deleted from the material submitted.

The staff director of Aspin's HPSCI Subcommittee on Oversight has indicated to OLC that this subject may have prompted Aspin's remark Consequently, I think we should address the remark in this context.

7. The Agency first litigated over the issue of prepublication review in 1972 in U.S. v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), cert. denied, 409 U.S. 1063 (hereinafter Marchetti I. In Marchetti I, the United States sued to enjoin a former employee from publishing a proposed book unless and until the employee submitted it to the Agency for review. In upholding the district court's granting of a preliminary injunction, the court of appeals recognized that the employee would be entitled to court review of a disapproval by CIA of publication of any material. However, the court of appeals indicated that the scope of such judicial review would be quite narrow and would not permit the court to determine the appropriateness of classification. The Marchetti I court stated:

> If in the conduct of its [CIA's] operations the need for secrecy requires a system of classification of documents and information, the process of classification is part of the executive function beyond the scope of judicial review.
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> There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.
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> The issues upon judicial review would seem to be simply whether or not the information was classified and, if so, wehther or not, by prior disclosure, it had come into the public domain.

8. Upon completion of his book, Mr. Marchetti submitted it for review as required by a permanent injunction which had been obtained under Marchetti I. After review and a final determination by the Agency that 168 items would have to be deleted because they contained classified information, Marchetti and his publisher, Alfred A. Knopf, Inc. brought an action in federal district court to obtain approval of publication of the book as written. Following a trial, the district court judge determined that evidence produced by the Government, mainly in the form of testimony by the deputy directors, failed to prove that over 100 of the deletions were properly classified at the time Marchetti was employed. The district court apparently felt constrained in part by the guidance in Marchetti I that Executive

decisions were beyond the scope of judicial review. This caused the court to ignore the testimony of deputy directors about the current classifiability of the 168 deletions and to look instead for proof of classification at the time the information was created or when Marchetti was employed. That required evidence of someone's earlier classification decision, which in most cases could not be adduced.

9. On appeal, in Alfred A. Knopf Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1974) cert. denied, 421 U.S. 992 (1975), rehearing denied, 422 U.S. 1049 (hereinafter Marchetti II), the court of appeals pointed out that the district court had applied too strict a standard in requiring the Government to prove classification, admittedly perhaps as a result of the court of appeals' own decision in Marchetti I. The Marchetti II court stated that the Government should properly be requested to show only two elements to sustain the deletions. First, it would have to show that the information was somehow designated as classified originally or when it was made known to an employee. To do this the Government need not prove someone's specific, deliberate classification decision, but only that the information appeared within a document marked with a classification stamp. Thereafter, a presumption of regularity in the performance of official duties by a public official "requires the conclusion that all information within it [the document], required by the Executive Order to be classified, was classified when the legend was affixed to the document...."

10. In explaining the second element necessary to sustain the deletions, the Marchetti II court modified the position it took in Marchetti I regarding judicial review of Executive classification decisions. In doing so, the court was influenced by the FOIA amendments of October, 1974. As mentioned in paragraph 3, above, those amendments modified the FOIA exemption for matters authorized by Executive order to be kept secret in the interest of the national defense or foreign policy by requiring that the matters be "in fact properly classified pursuant to such Executive order" and by providing that a district court can determine the matter de novo with respect to records alleged to be improperly withheld. The Marchetti II court stated:

> Since the Freedom of Information Act as now amended clearly provides for judicial review of questions of classifiability, any citizen now can compel the production of information actually classified if its classification

> was not authorized by the Executive Order. These plaintiffs should not be denied the right to publish information which any citizen could compel the CIA to produce and, after production, could publish. We thus move to the conclusion that the deletion items should be suppressed only if they are found both to be classfied and classifiable under the Executive Order.
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> The author of this opinion has examined some, but not all, of the 142 deletion items. [The district court had found 26 of the 168 deletions properly classified.] The information in at least some of them does relate to sensitive intelligence operations and to scientific and technological developments useful, if not vital, to national security. Such items would seem clearly to be classifiable under the authorization of the Executive Order....

Thus, after Marchetti II, the Government must be prepared to show to a court not only that the information was properly classified physically (or otherwise) when learned by a former employee but that it continues to be classifiable under the standards of the Executive Order. This, of course, is a far cry from Aspin's charge that the Agency is the final arbiter of what is and isn't classified in the context of pre-publication review of manuscripts of former employees.

11. Staff Position: Congressman Aspin's statement as it may refer to FOIA and pre-publication review matters is simply incorrect in light of the 1974 FOIA amendments and the MARCHETTI II. While the Executive Branch might challenge the constitutionality of judicial review of classification decisions if a court were to rule against an Executive claim of classification, that does not change the fact that Congress has provided for another arbiter of what is classified.

12. Recommendation. It is recommended that you consider the attached proposed letter to Congressman Aspin.

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Anthony A. Lapham

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